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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1983

DONALD E. PERCY,

Petitioner,

v.

MILDRED DAUBERT and
ETHEL ROYSTER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin

ROBERT W. LARSEN
Assistant Attorney General
of Wisconsin

Attorneys for Petitioner

Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3076

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PETITION FOR A WRIT OF
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QUESTION PRESENTED FOR REVIEW

Where a state changes an AFDC payment policy in a manner authorized by applicable state and federal law and consonant with a federal court order granting relief from a prior judgment

which if unchanged would have precluded the subject change in policy, and the order granting relief from a prior judgment is subsequently reversed with respect to a particular previous time period, is the granting of retroactive monetary payments for that prior time period barred by the eleventh amendment.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit dated August 4, 1983, which is the subject of this petition is at App. 149-156.

The Decision and Order of the United States District Court for the Eastern District of Wisconsin dated September 28, 1982, is at App. 145-148.

The unpublished order of the United States Court of Appeals for the Seventh

Circuit dated August 3, 1981, is at App. 117-144.

A Decision and Order of the United States District Court for the Eastern District of Wisconsin dated October 21, 1980, is at App. 101-116.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit was dated and entered August 4, 1983. A Petition for Rehearing, filed August 17, 1983, was denied by an Order dated September 20, 1983. App. 157. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or

by Citizens or Subjects of any Foreign State." U. S. Const. amend. XI.

STATEMENT OF THE CASE

This petition concerns a decision of the United States Seventh Circuit Court of Appeals dated August 4, 1983, affirming a United States District Court decision dated September 28, 1982, ordering the State of Wisconsin to make retroactive monetary payments to certain AFDC recipients who were affected by a change in the State's AFDC initial payment policy during the period from November 5, 1980 to April 1, 1981.

A chronology of events follows.

A consent judgment was originally entered in this case on June 1, 1973. The first paragraph provided that:

> [Defendants] are hereby permanently enjoined from failing to make grants of financial assistance under the categorical assistance programs known as Blind Aid, § 49.18,

> WIS. STATS. (1971), Aid to Families with Dependent Children, § 49.19, WIS. STATS. (1971), Old Age Assistance, §§ 42.22 et seq., WIS. STATS. (1971), and Disabled Aid, § 49.61, WIS. STATS. (1971), retroactive to the first of the month in which such financial assistance is applied for and eligibility is shown to have existed.

The principal defendant subject to the consent judgment was the Secretary of the State of Wisconsin Department of Health and Social Services. The petitioner was the Secretary of the state Department of Health and Social Services as of the time of the appeal which resulted in the decision sought to be reviewed herein (hereinafter "the state").[1/]

The effect of the above quoted paragraph was to equalize the treatment of persons entering the four public

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1/ U.S. Sup. Ct. Rule 19.6.

assistance programs involved. Under all four programs all new recipients would have their financial assistance calculated retroactive to the first day of the month in which their application is made and eligibility is found to exist. The state's policy following the entry of the June 1973, judgment was in compliance with the judgment.

On August 22, 1980, the state notified the District Court that it intended to alter the effective date of eligiblity for applicants for Aid to Families with Dependent Children (hereinafter AFDC) so that it would no longer be retroactive to the first of the month of application or as soon thereafter as eligibility was shown to exist, but rather so that the effective eligibility date would be the date on which an AFDC application is entered into

the state computer system to be processed, or twenty-nine (29) days from the date of application, whichever is less. The general effect of the change would be to reduce the number of days of eligibility for the initial payment and thus reduce the amount of the initial AFDC payment.

Also on August 22, 1980, the state filed a Motion for Relief from the terms of the 1973 judgment cited above. The motion was brought pursuant to Rule 60(b)(5) Fed. R. Civ. P. on the ground that continued enforcement of the cited provision of the 1973 judgment was no longer equitable.

Respondents filed a motion for an order adjudging defendants in contempt of the judgment entered on June 1973. At a hearing on this motion, held on September 2, 1980, the District Court ruled orally

that the first paragraph of the 1973 judgment by its literal terms did prohibit the state from making the change in the initial payment policy unless and until modification of the judgment was granted by the court.

On October 21, 1980, the District Court issued a Decision and Order granting the state's motion for relief from the first paragraph of the judgment entered on June 1, 1973. Appendix 101. In so deciding, the district court ruled that the change in policy desired by the state was within the latitude of authority granted by applicable state and federal law. Appendix 111-112. The court also ruled that restrictions imposed by the 1973 injunction were beyond the scope of the underlying lawsuit. Appendix 112-113.

On appeal the United States Court of Appeals for the Seventh Circuit reversed in part and affirmed in part the district court's decision. The court reversed the district court to the extent the district court granted relief from the 1973 judgment for the period from November 5, 1980 to April 1, 1981. Reversal was based on the holding that the district court had misinterpreted Rule 60(b)(5) in granting relief. Appendix 143.

The district court's decision was affirmed to the extent it granted relief for the period April 1, 1981, and thereafter. Affirmance was based on the passage of new legislation in Wisconsin which itself changed the subject AFDC policy. The legislation took effect on April 1, 1981. Appendix 135-136.

The court of appeals remanded the case "for a determination by the district

court of the appropriate relief to be accorded to the respondents for the period ensuing after the entry November 5, 1980, of the amended judgment and prior to the April 1, 1981, amendment of sec. 49.14(4)(b), Wis. Stat." Appendix 143-144.

On remand, the respondents sought retroactive monetary relief and the state opposed the same as being barred by the eleventh amendment. The Decision and Order of the district court dated September 28, 1982, ordered the payment of retroactive monetary relief to persons affected by the initial payment policy in effect from November 5, 1980 to April 1, 1981. Appendix 147-148. In the Decision here sought to be reviewed the United States Court of Appeals for the Seventh Circuit affirmed that judgment. Appendix 149.

ARGUMENT

Once again it becomes necessary for a sovereign State of these United States to come to this highest Court from the Seventh Circuit Court of Appeals in order to preserve and enjoy its constitutional rights under the eleventh amendment of the United States Constitution. The Court of Appeals has once again imposed its will in direct contravention of the eleventh amendment as interpreted by this Court.

If we are to preserve the awesome respect due our Constitution, we must respect every provision. If we are to preserve the respect due our federal judiciary, we must hope this Court of last resort will take the time to restore worthiness where to this point the lower federal courts have blatantly acted beyond their constitutional authority and

have blithely violated the constitutional rights of the sovereign State of Wisconsin.

I. The Eleventh Amendment To The United States Constitution Deprives The Federal Courts Of Jurisdiction Over The Plaintiffs' Claim For Monetary Relief.

The eleventh amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

As stated by Justice Powell in his dissent in the recent case of Patsy v. Board of Regents of State of Fla., 457 U.S. 496, 102 S. Ct. 2557 (1982), the

eleventh amendment is a clear constitutional limitation on federal judicial power. 102 S. Ct. at 2573.

By its terms, the amendment bars suits against a state by citizens of another or foreign state. By construction, it further bars suit against a state by its own citizens. Edelman v. Jordan, 415 U.S. 651, 662 (1974). The bar applies when a state is a named party, a so-called "direct suit," Osborn et al. v. The Bank of the United States, 22 U.S. (9 Wheat. 739) 251 (1824), or when the judgment would be awarded from the state treasury, regardless of who is the named party defendant. Ford Motor Co. v. Department of Treasury, Etc., 323 U.S. 459 (1945).

In Edelman, 415 U.S. at 663, the court quoted from Ford Motor Co., 323 U.S. at 464: "'[W]hen the action is in

essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.'"

When this matter was remanded by the Court of Appeals to the District Court with instructions to determine the "appropriate relief," respondents sought retroactive monetary payments for the class of AFDC recipients affected by the change in the initial payment policy during the period from November 5, 1980 to April 1, 1981. This claim would have to be paid from the state treasury. It is in essence a claim for recovery of money from the State. Unquestionably, the State of Wisconsin is the real and substantial party in interest. Therefore, the State is entitled to invoke,

and expect enforcement of, its sovereign immunity from pursuit of the claim in federal court.

II. The Respondents' Claim Does Not Fall Within The Very Narrow Exception To The Eleventh Amendment Bar.

A. In order to avoid the eleventh amendment bar, plaintiffs must allege that public officials were acting beyond their authority or if they were acting within their authority that the authority is unconstitutional.

This Court has held that the eleventh amendment does not bar an action in federal court if it is alleged that state officials are acting beyond their authority or that ostensible authority on which they rely is unconstitutional. Worcester County Trust Co. v. Riley, 302 U.S. 292, 297 (1937). The vitality of this proposition was affirmed recently in

Cory v. White, 457 U.S. 85, 102 S. Ct. 2325 (1982). The rationale for this exception is that under such circumstances the public officials are not acting for the sovereign, so the suit against the officials is not a suit against the sovereign and is not barred by the eleventh amendment. See Larson v. Domestic & Foreign Commerce Corporation, 337 U.S. 682, 689-90 (1949).

It was through this exception to the eleventh amendment that the respondents were able to bring their original lawsuit in federal court back in 1973. They sued the Secretary of the State Department of Health and Social Services and his agents and employes and alleged that certain state policies were in violation of the federal constitution and federal statutes and regulations. The suit fell within the exception to the eleventh amendment

because of allegations that the officials were acting beyond their authority or, if within their authority, that the authority was unconstitutional.

B. The respondents do not and cannot allege that the disputed change in AFDC policy was beyond the authority of public officials or was unconstitutional.

The respondents do not allege that the change in the AFDC initial payment policy on November 5, 1980, was beyond the authority of the officials involved or was based on some unconstitutional authority.

Indeed, the district court held that the change in policy was authorized by and consistent with state and federal law. Appendix 111-112. Respondents have never maintained otherwise, and this holding of the district court remains the law of this case. There has been no

contention that the state and federal laws relied upon were unconstitutional.

Furthermore, as of the date the change in policy was implemented, the district court had granted relief from the 1973 judgment. There was no legal impediment to the change in policy.

Therefore, in all respects the public officials of the State of Wisconsin were acting in accordance with constitutional authority when they modified the AFDC initial payment policy. Their acts are thus acts of the sovereign State of Wisconsin, and the eleventh amendment prohibits any federal court from even considering respondents' claim. This immunity prevails regardless whether the relief is monetary or otherwise and whether characterized as retroactive or prospective. Cory v. White, 102 S. Ct. at 2329.

III. Even If The Respondents' Claim Falls Within The Exception To The Eleventh Amendment, The Eleventh Amendment Bars The Sort Of Relief Sought And Granted.

A. The eleventh amendment bars the granting of retroactive monetary relief against a State.

Even in cases where it is alleged that the conduct of state officials is beyond their authority or is based on unconstitutional authority, so as to fall within the exception to sovereign immunity under the eleventh amendment, the power of the federal courts is restricted as to the relief that may be granted. The federal court may grant only prospective relief which remedies the ultra vires or unconstitutional conduct of the State officials involved. Edelman v. Jordan, 415 U.S. 651, 663-65 (1974). The federal court

cannot order the prospective or retroactive payment of money from the state treasury. However, the eleventh amendment is considered to be not violated if the necessary prospective injunctive relief has merely an ancillary monetary impact on the state treasury. Edelman, 415 U.S. at 667.

In Edelman, plaintiffs challenged aspects of the Illinois Aid to the Aged, Blind and Disabled program on the ground they violated federal law. Both the district court and the Seventh Circuit Court of Appeals ordered state officials to remit benefits wrongfully withheld between the effective date of the federal regulations and the date the preliminary injunction was issued by the district court. The Supreme Court reversed the granting of retroactive monetary relief, stressing that the award was

indistinguishable from an award of monetary damages against the state:

> It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.

Edelman, 415 U.S. at 668.

The vitality of the Edelman decision was reaffirmed by the United States Supreme Court in Florida Dept. of Health v. Fla. Nursing Home Assn., 450 U.S. 147 (1981). The court described Edelman as being controlling and observed that the court of appeals had properly "acknowledged that retroactive monetary relief against a State in federal court is forbidden by the Eleventh Amendment 'if not consented to by the state.'" 450 U.S. at 149.

Justice Stevens concurred in the decision even though he believes Edelman is wrong. He expresses concern about the adequacy of remedies for citizens injured by their governments. But that concern is overridden by his concern for the legal system and the essential observance of the doctrine of stare decisis. 450 U.S. at 151.

The cases have considered two possible exceptions to the eleventh amendment. One, the "equitable restitution" theory, has been rejected. The other, involving ancillary fiscal impact of prospective relief, has been allowed.

In reversing the portion of the seventh circuit's opinion which ordered retroactive relief, the Supreme Court in Edelman specifically rejected the argument that monetary award is

appropriate when in the nature of "equitable restitution" rather than damages. Edelman, 415 U.S. at 666. While recognizing that "prospective" relief can have an impact on state treasuries, the court drew the following distinction between constitutionally permissible and impermissible relief:

> But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex parte Young, supra.
>
> But that portion of the District Court's decree which petitioner challenges on Eleventh Amendment grounds goes much further than any of the cases cited. It requires

> payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard. While the Court of Appeals described this retroactive award of monetary relief as a form of "equitable restitution," it is in practical effect indistinguishable in many aspects from an award of damages against the State. It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.

Edelman, 415 U.S. at 667-68 (emphasis supplied).

In Quern v. Jordan, 440 U.S. 332 (1979), the supreme court summarized its holding in Edelman as follows: "In Edelman we held that retroactive welfare

benefits awarded by a Federal District Court to plaintiffs, by reason of wrongful denial of benefits by state officials prior to the entry of the court's order determining the wrongfulness of their actions, violated the Eleventh Amendment." Quern, 440 U.S. at 333-34 (emphasis supplied).

The breadth and vitality of the Edelman decision and the eleventh amendment have again been reaffirmed by this Court in Cory v. White. The court forcefully reiterates that the eleventh amendment bars a suit seeking to impose a liability that must be paid from public funds in the state treasury. 102 S. Ct. at 2329. The court warns that the eleventh amendment may apply to plaintiffs other than private parties; it may apply to suits seeking injunctive relief as well as monetary relief; and it

may apply to prospective relief as well as retrospective relief. 102 S. Ct. at 2329.

B. The relief awarded by the federal courts in this case is not prospective or ancillary and is retroactive monetary relief which is prohibited by the eleventh amendment.

The Decision and Order of the District Court directs the state to recalculate all initial AFDC grants made between November 5, 1980, and April 1, 1981. The recalculation is to assume that the initial payment policy was not changed. Any difference between the recalculated amount and the amount actually paid is to be paid from the state treasury to AFDC recipients who were affected by the change in policy in effect during that period of time. Appendix 147-148.

This is clearly a federal court order that purports to compel retroactive monetary payments from a state's treasury. It is clearly an order which purports to give retroactive monetary effect to the court of appeals order of August 3, 1981, wherein the court reversed the district court's granting of relief from the 1973 judgment. It is not the sort of prospective decree that rectifies future conduct of state officials. It is therefore prohibited by the eleventh amendment.

This conclusion is mandated by Edelman, but it should be pointed out that in the instant case the State of Wisconsin is in a stronger "equitable" position than the state in Edelman. In Edelman, the state withheld money pursuant to state regulations that were eventually held to be in violation of

federal law. In contrast, in this case the district court expressly held that the change in the AFDC initial payment policy was within the latitude prescribed by federal law. Appendix 111-112. Furthermore, the state's action was compatible with the district court's decision granting relief from the 1973 judgment. So, at the time it changed the AFDC policy, and for as long as it was in effect, the state's action was authorized by state and federal law and the district court's decision and order. The state policy in effect during the period in question never became unlawful. It has never been declared so.

Even if the state practice were considered "unlawful," it was not declared so until the time of the decision of the Seventh Circuit Court of Appeals, August 3, 1981. The state

practice in effect prior to that decision is immune from monetary liability by virtue of the eleventh amendment.

A factually very similar and legally instructive case is Kimble v. Solomon, 599 F.2d 599 (4th Cir.), cert. denied, 444 U.S. 950 (1979). The State of Maryland attempted to reduce medicaid payments by changing medical coverages. The federal district court invalidated the effort on the ground that the state failed to give adequate notice to recipients, as required by federal law. The district court ordered the state to comply with the notice requirements, but denied any other relief.

On appeal, the court of appeals states that the focus of the eleventh amendment is on the nature of the relief sought. Kimble, 599 F.2d at 604 n. 6. The court summarizes the holding in

Edelman as follows: "[T]he Supreme Court made clear that the doctrine of Ex parte Young permits suits for prospective relief only, and that the eleventh amendment precludes retrospective relief in the nature of a monetary award against the state ...." Edelman, 415 U.S. at 603.

The court of appeals discusses the importance of and difference between prospective and retrospective relief. With respect to medical services that had been received but for which the state denied payment the court said:

> We think that the first, retrospective component of this relief would be barred by the eleventh amendment. Although the recipients who have already received medical services are arguably entitled to benefits under pre-1976 law, Maryland's obligation to pay these benefits arose at the time the treatments were received, and the state has denied them. To require the state to make payments for these past medical

> services would be tantamount to "'the award of an accrued monetary liability ...' which represent[s] 'retroactive payments.'" Milliken v. Bradley, 433 U.S. at 289, 97 S. Ct. at 2761 (quoting Edelman v. Jordan, 415 U.S. at 663-64, 94 S. Ct. 1347) (emphasis supplied by the Milliken Court).

Kimble, 599 F.2d at 604-05.

This is very similar to the situation in the instant case. If AFDC recipients who received their initial AFDC payments between November 5, 1980 and April 1, 1981, were entitled to an amount greater than what they received, the order of the district court requiring the state to pay the difference is the award of an accrued monetary liability which represents retroactive payments. If this sort of relief is to be had, it must be had under state law because it is barred under federal law.

IV. The Rationale Of The Court Of Appeals In This Case Is Antithetical To The Eleventh Amendment.

In depriving the State of Wisconsin of its sovereign immunity guaranteed by the United States Constitution, the court of appeals says that the eleventh amendment is not intended to protect a state against the possibility of having a favorable decision reversed on appeal. Appendix 152. The court suggests that the state's likelihood of being reversed on the first appeal was "not so slight that it is unfair to require that states make allowance for it -- i.e., by setting aside pending appeal a reserve of funds in an escrow account." Appendix 152-153. No authority is provided for this proposition which is patently antithetical to the dictates of the eleventh amendment.

Among other things, the eleventh amendment protects states from having to pay out money for periods of time during which they are under no definite legal obligation to do so, as where there is no court order requiring the payments. To say that states should establish reserve funds even when they are under no such obligation is a direct infringement on this protection.

The suggestion that the state set up a reserve fund is especially anamalous under the circumstances in this case. Here, the reason for seeking relief from the 1973 judgment was that the state did not have enough income to pay its expenses and obligations. It sought to diminish its costs under the AFDC program so that the "savings" could be used to pay for other unavoidable expenses or to at least lessen future debts. This

purpose would have been entirely frustrated if the "savings" had to be put in a reserve fund to cover the possibility of reversal on appeal.

The court of appeals' rationale is extremely disturbing if limited to the instant case, but beyond this case is total subversion of the eleventh amendment. At the very least the decision says that if a state obtains a judgment in district court that is favorable (i.e., in that the state avoids or lessens an obligation to make certain payments), and if the possibility that a court of appeals might reverse the district court is not so slight that it is unfair to require the state to establish a reserve fund, then the eleventh amendment does not apply. The applicability of the eleventh amendment, as written and interpreted by the United

States Supreme Court, does not turn on the "ability to pay." The eleventh amendment is an express limitation on the jurisdiction of federal courts. Its terms of proscription bear repeating: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

It should be pointed out that the court of appeals may have had the opportunity to accomplish constitutionally, what is now unconstitutional. When the first appeal was taken, the respondents moved for a stay. If the court of appeals had granted the stay prohibiting the State from changing AFDC payments pending appeal, it could have

accorded prospective protection which may have been permissible under the eleventh amendment. But the court denied the stay on December 15, 1980. Relying on the district court's granting of relief and the court of appeals refusal to grant a stay, the State of Wisconsin continued to implement the money-saving policy and the savings were diverted, as if cash, to other expense obligations at a time of fiscal crisis. The eleventh amendment now prohibits the court from providing monetary relief retroactively.

The court of appeals resort to cases involving contemptuous conduct is especially dismaying. In Hutto v. Finney, 437 U.S. 678 (1978), cited by the court of appeals, the Supreme Court held that the eleventh amendment did not bar the awarding of $20,000 in attorney's fees where defendant state officials had

acted in bad faith. The finding of bad faith was based on the fact that conditions in the Arkansas prison system had been held unconstitutional in 1965, 1968 and 1969. Following the 1969 decision the district court retained supervisory jurisdiction to monitor compliance. Review hearings were held over the years. Conditions improved at first but by 1976 the court found that conditions were worse than they were in 1973. The supreme court considered the awarding of attorney's fees to be a financial penalty justified by the defendant's bad faith noncompliance with outstanding court orders. Hutto, 437 U.S. at 691.

In the case at bar the State of Wisconsin scrupulously avoided contemptuous conduct. When apprised by the district court on September 2, 1980, that

the court considered the proposed change in policy to constitute a technical violation of the 1973 judgment, the state assured the court that the change would not be implemented pending the court's final decision. The state participated in and awaited the fruits of the judicial process for almost two months until the court granted the relief sought. In granting the relief, the court said it was appropriate to avoid "a significant injustice." Appendix 109. Only then, in reliance on the district court order, did the state proceed with its money-saving change in policy.

The facts that the state had continued to pay benefits in accord with the 1973 consent judgment for seven years and the controversial period involves only five months are not bases for depriving the State of Wisconsin of its

constitutional rights. The court of appeals appears to acknowledge that the district court's order does constitute a retroactive award of monetary relief. As such, it is barred by the eleventh amendment.

It is immaterial whether there will in fact be a disruptive effect on the state's budget. It is not within the province of the court to decide that the $1.8 million at stake is not enough to be concerned about.[2/] The eleventh amendment is a constitutional restriction on the power of the court, and the State of Wisconsin has a right to have it honored.[3/]

2/ Even the award of one dollar violates the eleventh amendment. Owen v. Lash, 682 F.2d 648, 655 (7th Cir. 1982).

3/ Id. at 655.

CONCLUSION

Where, as here, the federal judiciary is the arbiter of its own constitutional power, it is essential to the very integrity of our system that the courts comply with the clear constitutional limitations that pertain to their own judicial power. In this case, the lower federal courts have presumed to exercise authority beyond that granted by the Constitution. In doing so, they have violated the fundamental constitutional rights and sovereign immunity of the State of Wisconsin.

We implore this highest court to correct this dangerous abuse of judicial power.

Dated at Madison, Wisconsin, this 15th day of December 1983.

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin

ROBERT W. LARSEN
Assistant Attorney General
of Wisconsin

Attorneys for Petitioner

Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3076

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

MILDRED DAUBERT and ETHEL ROYSTER, individually and on behalf of all other persons similarly situated,

Plaintiffs,

v. No. 73-C-11

WILBUR J. SCHMIDT, et al.,

Defendants.

DECISION and ORDER

Before the court is the motion of the defendants for relief from the consent judgment entered in this action on June 1, 1973. This motion is brought pursuant to Rule 60(b)(5), Federal Rules of Civil Procedure, by Donald E. Percy, the successor in office to Wilber J. Schmidt as secretary of the Department of Health and Social Services for the state of Wisconsin (DHSS).

This action originally arose as an action brought against Mr. Schmidt and DHSS to declare "that the defendant's failure to make awards of categorical assistance retroactive to the first of the month in which the application is made to persons who received general relief during the pendency of their application violates rights secured by [various constitutional and statutory provisions]...." ¶3, Prayer for Relief, Verified Complaint, p. 10 (filed January 9, 1973). Injunctive relief was sought.

The parties subsequently agreed to settle the action and prepared a consent judgment for entry by the court. The judgment was entered on June 1, 1973. The first paragraph of the consent judgment provided:

> "Defendant WILBUR J. SCHMIDT, as Secretary of the Wisconsin Department of Health and Social

> Services, and [others], are hereby permanently enjoined from failing to make grants of financial assistance under the categorical assistance programs known as Blind Aid, §49.18, WIS. STATS. (1971), Aid to Families with Dependent Children, § 49.19, WIS. STATS. (1971), Old Age Assistance, §§ 42.22 et seq., WIS. STATS. (1971), and Disabled Aid, § 49.61, WIS. STATS. (1971) retroactive to the first of the month in which such financial assistance is applied for and eligibility is shown to have existed."

The mandate contained in the 1973 judgment has continued in effect to this date. However, earlier in the present year Mr. Percy as head of DHSS determined that budgetary problems required that DHSS reduce its expenditures. One proposed cost-cutting measure was to change the DHSS policy of paying benefits made under Aid to Families with Dependent Children program (AFDC). Up to

that time, such benefits were made retroactive to the first day of the month in which a completed application was submitted if eligibility was shown to exist as of the first of that month. See Income Maintenance Manual of DHSS, § III-D-12(6)(b). It was proposed to alter that policy to pay benefits as of the date of entry of the application into the state computer system, or twenty-nine days from the date of the application, whichever was less.

On September 2, 1980, I held a hearing on the plaintiffs' motion to find the defendants in contempt for violating the terms of the 1973 consent judgment. While I declined to find the defendants in contempt, I did find that the proposed policy change violated the literal terms of paragraph one of the 1973 consent judgment. DHSS has continued to comply

with the policy required by the 1973 judgment, pending resolution of the motion now before the court.

The plaintiffs urge that Mr. Percy errs in referring to the policy of granting AFDC eligibility retroactive to the first of the month of application as a "voluntary" policy; it is, as the plaintiffs point out, a policy ordered by the court. Nevertheless, the court does have the power to modify this injunction even though it was the product of an agreement between the parties. The defendants aptly quote Justice Cardozo's comment in United States v. Swift & Co., 286 U.S. 106, 114-15 (1932):

> "We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent....A continuing decree of injunction directed to events to come is subject always to adap-

> tation as events may shape the need.... [A] court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong." (citations omitted).

The defendant has moved for modification pursuant to Rule 60(b)(5), Federal Rules of Civil Procedure. The portion of that rule relevant to this case provides that a party may be relieved from a final judgment if "it is no longer equitable that the judgment should have prospective application." The court of appeals for the seventh circuit has interpreted Rule 60(b)(5) to require the movant to show "how continued enforcement of the injunction works an injustice or constitutes a 'grievous wrong.'" De Filippis v. United States, 567 F.2d 341, 344 (7th Cir. 1977) (citing

Swift, supra). Determinating whether an injunction should be modified is left to the discretion of the trial court. International Nikoh Corp. v. H. K. Porter Co., 374 F.2d 82 (7th Cir. 1967); Wright & Miller, Federal Practice and Procedure: Civil § 2857.

The plaintiffs have argued that under De Filippis the defendants must demonstrate changed circumstances that make continued enforcement of the injunction a "grievous wrong"; the defendants have urged that such changed circumstances exist. The defendants place great weight on the fact that three of the four categorical aid programs mentioned in paragraph one of the 1973 judgment are no longer administered by the state. The three programs (old age assistance, blind aid, and disabled aid) were repealed in favor of federal admini-

stration. The defendants argue that this removes a major basis for the original lawsuit and the 1973 judgment.

There are two answers to the defendants' argument. First, the AFDC program, which is the subject of the controversy at bar, is still in fact administered by the state. Its status has not been altered in any way. Secondly, the change in the other three categorical aid programs became effective on January 1, 1974. Thus the change in the program administration occurred over five years ago. It is a little difficult, at this late date, to regard this alteration as a "changed circumstance" sufficient to justify modification of this injunction.

In addition to the "changed circumstances" test in De Filippis, I believe that such case permits a broader

consideration in resolving the issue of amending the judgment. The party desiring modification may also show that continued enforcement of the injunction "works an injustice." De Filippis, p. 344. I am convinced that further enforcement of paragraph one of the 1973 judgment will indeed work a significant injustice sufficient to warrant modification of the injunction.

My determination regarding continued enforcement of this injunction is supported by an examination of the gravaman of the original action. At the time of the commencement of this lawsuit, the state maintained the four categorical aid programs and a general relief program. The four programs were governed by both state and federal regulations. The general relief program was entirely a state program administered by county

welfare agencies. Wis. Stat. § 49.01 et seq. As noted above, the plaintiffs in the original action were concerned about applicants in the four categorical programs who first received general relief from the state. The complaint alleges that DHSS would not grant financial assistance to applicants for aid under the four programs for any period when the applicant had received general relief. DHSS had a presumption that the aid from the general relief program was sufficient to provide for the applicant's needs.

This presumption had the result that those who received general relief prior to a finding of eligibility for the four programs were treated less favorably than those applicants for the four programs who did not receive general relief. A fair reading of the original complaint

reveals that it was this differential treatment that was challenged on constitutional and statutory grounds.

The underlying lawsuit was not an action to require DHSS to pay benefits under the four programs retroactive to the first day of the month when the application was filed; that policy was in effect prior to the filing of the lawsuit and was not directly affected by the lawsuit. The relief sought by the plaintiffs in 1973 was a requirement that DHSS apply this policy uniformly to all applicants for aid under the four categorical aid programs, irrespective of whether an applicant had received general relief or not.

DHSS is not required by any statute or regulation to maintain this policy. DHSS was and is permitted to pay benefits in this manner if it wishes. 45

C.F.R. § 206.10(a)(6); Wis. Adm. Code, § PW-PA 20.11. These regulations give DHSS discretion to set the timing of the commencement of benefits within certain limits. The proposed change in policy is within those regulatory requirements.

Thus the 1973 judgment is the only constraint that exists to prevent DHSS from changing its policy regarding the time for commencement of benefits. While the literal terms of paragraph one of the 1973 judgment require this result, it is clear that when the 1973 judgment is read in its entirety, its purpose is to end the disparate treatment between those who received general relief and those who did not. Paragraphs 2, 3 and 4 directly support this interpretation. I am convinced that it would be an injustice to interpret the 1973 judgment in the manner the plaintiffs wish when the

effect should be far greater than that necessary to achieve the relief originally sought. This is especially so when the desired interpretation completely removes all administrative discretion from the agency that has been properly given it in the statutory framework.

The plaintiffs argue that they had significant statutory and constitutional arguments in 1973, the airing of which the consent judgment foreclosed. This is probably true, but it is not a justification for the interpretation urged by the plaintiffs. The complaint did not seek as relief the interpretation that the plaintiffs now advance, and the plaintiffs concede that then, as now, the applicable rules permitted the policy change sought by the defendants. Thus the plaintiffs' argument that the modification sought will in some way deprive

the plaintiffs of their right fully to litigate this action is not persuasive.

The defendants have put forward the budgetary problems faced by DHSS and the state of Wisconsin as a changed circumstance sufficient to justify modification of the injunction. The plaintiffs in turn argue that these budgetary problems are not sufficient and cite considerable case law in support of that position. I am mindful of the problems outlined in Mr. Percy's affidavit, but I do not base this decision on them. I believe that it is the wiser use of the court's discretion to analyze this question solely in terms of the effect that the literal provisions of this injunction has on the proper discretion of DHSS. Therefore I do not reach the issue whether the budgetary problems outlined are a sufficient change in

circumstances to justify modification of this injunction. I am persuaded that the operation of this injunction totally curtails the discretion of DHSS in this area and that this is an injustice that warrants relief from the 1973 judgment. Accordingly, the defendants' motion for relief will be granted and paragraph one of the 1973 judgment will be vacated.

The defendants have not provided the court with any guidance as to how the amended injunction should read. The defendants are requested to serve and file a proposed injunction within ten days which will be consistent with this opinion and will continue to require DHSS to grant AFDC aid to recipients of general relief in the same manner as AFDC aid is granted to those who do not receive general relief. The plaintiffs will then be permitted ten days to submit

any objection they may have to the defendants' proposed injunction.

Therefore, IT IS ORDERED that the defendants' motion for relief from judgment be and hereby is granted.

Dated at Milwaukee, Wisconsin, this 21 day of October, 1980.

/s/ Myron L. Gordon
U. S. District Judge

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Argued: May 8, 1981

August 3, 1981

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. WILLIAM J. CAMPBELL, Senior District Judge*

MILDRED DAUBERT and ETHEL ROYSTER, Individually and on behalf of all other persons similarly situated, Plaintiffs-Appellants,	)	Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 80-2633 vs.	)	No. 73-C-11
DONALD E. PERCY, etc., Defendant-Appellee.	)	Myron L. Gordon Judge.

Order

Plaintiffs-appellants, a class of Wisconsin welfare recipients, take this

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*/ The Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.

appeal from the Decision and Order of the United States District Court for the Eastern District of Wisconsin, dated October 21, 1980, granting the defendants' motion for relief from the judgment originally entered in this class action pursuant to a consent decree on June 1, 1973. The defendants sought relief from the terms of the consent decree which inter alia, enjoined the Secretary of the Department of Health and Social Services of Wisconsin (hereinafter "DHSS") from "failing to make grants of financial assistance (under the Aid to Families of Dependent Children (hereinafter "AFDC") and other welfare programs operated by the state), retroactive to the first of the month in which such financial assistance is applied for and eligibility is shown to have existed." Relief was sought by DHSS under Rule

60(b)(5) of the Federal Rules of Civil Procedure from the terms of the 1973 judgment that conflict with a DHSS proposal to change the date of the initial payment of benefits to AFDC recipients. Such relief was granted by the district court on the grounds that the decree effectively curtailed the discretion of DHSS over the timing of the commencement of the payment of benefits under the AFDC regulations and provided broader relief to the plaintiffs than was necessary to achieve the relief originally sought. The plaintiffs appeal from that decision and order.

Subsequent to the taking of this appeal, the Wisconsin legislature amended the state statute governing the effective date of eligibility for AFDC recipients. The amended statute provides that the effective date of eligibility for aid is

the date the applicant submits a signed and completed application or the first date on which the applicant meets all of the eligibility criteria, whichever is later. Sec. 49.19(4)(b) Wis. Stats., effective April 1, 1981. DHSS is statutorily bound to comply with this legislative directive.

I.

The factual background of this case is as follows: The plaintiffs brought their original class action for declaratory and injunctive relief on behalf of all persons who were not awarded financial assistance under the categorical assistance programs of the Social Security Act of 1935, 42 U.S.C. § 301 et seq., retroactively to the first of the month in which they applied. The plaintiffs thereby challenged a DHSS policy of denying financial assistance to appli-

cants for aid for any period in which the applicant had received General Relief under the Wisconsin Social Services Program, Sec. 49.01 et seq., Wis. Stats. (1969) during the pendency of their applications. The challenged DHSS policy was based upon an assumption that General Relief adequately provided for an individual's needs and thus obviated the need for additional welfare benefits. The plaintiffs charged that this policy violated rights secured by the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution, the Social Security Act and Regulations of the Department of Health, Education and Welfare issued thereunder.

The parties subsequently entered into a consent decree on June 1, 1973, which provided in relevant part as follows:

> [Defendants] are hereby permanently enjoined from failing to make grants of financial assistance under the categorical assistance programs known as Blind Aid, Sec. 49.18, WIS. STATS. (1971), Aid to Families with Dependent Children, Sec. 49.19, WIS. STATS. (1971), Old Age Assistance, Secs. 42.22 et seq., WIS. STATS. (1971), and Disabled Aid, Sec. 49.61, WIS. STATS. (1971), retroactive to the first of the month in which such financial assistance is applied for and eligibility is shown to have existed.

On August 22, 1980, defendants filed in the district court a "Notice of Intention To Act Consistent With 45 C.F.R. 206.10(a)(6) and Sec. 49.19, Wis. Stats., and Rules Adopted Thereunder." The notice advised the court that the Secretary of DHSS intended to act pursuant to the authority vested in him under the

aforementioned statutes to alter the effective date of eligibility for applicants of AFDC. Under the proposed policy, new AFDC applicants would receive benefits beginning as of the time a completed application is entered into the state's computerized system, or twenty-nine days after the date of application, whichever came first. The proposed policy change would thus depart from the prior DHSS policy of paying benefits retroactive to the first of the month of application or as soon thereafter as eligibility was shown to exist. It would also contravene the literal terms of the 1973 consent decree. The defendants concurrently filed a motion for relief from the terms of the 1973 judgment under Rule 60(b)(5) of the Federal Rules of Civil Procedure.

The Secretary of the Wisconsin Department of Health and Social Services, Donald E. Percy, explained in an affidavit filed in support of the motion for relief that the proposed policy change was the agency's way of coping with state fiscal deficits by reducing the expenditures for the AFDC program through measures which were within the area of administrative discretion allowed under federal welfare regulations: the governing federal statute, 45 C.F.R. 206.10(a)(6), provides that, for the purposes of federal financial participation, entitlement will begin as specified in the state plan and may be as early as the first of the month in which an application has been received and the individual meets all of the eligibility conditions. Former Section 49.19 Wis. Stat. stated only that payments of aid to eligible

individuals will not be retroactive beyond the first of the month in which eligibility is established. State Administrative Code § PW-PA20.11(4), provides that the initial payment of categorical assistance may include the needs to the first of the month in which application for such assistance is made and eligibility is shown to have existed. As can be seen from the foregoing review, none of the pertinent state and federal provisions specifically provided that payment be made in the manner directed by the consent decree. Rather, the decree embodied the policy established by DHSS within its discretion under the relevant state and federal regulations noted above.

Defendants brought their motion for relief from judgment under Rule 60(b)(5) of the Federal Rules of Civil Procedure

based on the following grounds: first, that the equitable basis for granting the injunction no longer existed, and, second, that it would be inequitable to foreclose the exercise of administrative discretion that is clearly conferred by state and federal laws.[1] The district court agreed with the second ground for relief advanced by the defendants, that the operation of the injunction totally curtailed the discretion of DHSS to

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[1] The district court, in its Decision and Order dated October 21, 1980, disposed of the first ground by noting that although, as the defendants claimed, three of the four assistance programs were no longer administered by the state, those programs--Old Age Assistance, Blind Aid, and Disability Assistance Aid--were repealed in favor of federal administration on January 1, 1974, well over five years ago. Thus that change could not be regarded as a change in circumstance sufficient to justify modification of the injunction. Moreover, the court noted that the AFDC program, which is the subject of the controversy at bar, is still administered by the state.

determine the effective date of eligibility for welfare benefits. This alone, in the court's view, constituted an injustice warranting relief from the 1973 judgment. Furthermore, the court reasoned that it would be inequitable to bind the defendants to the 1973 decree inasmuch as it provided broader relief than was necessary to remedy the discriminatory treatment of General Relief recipients under the former payment policy of DHSS.[2/] The court specifically declined

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[2/] The court's conclusion that the decree granted overbroad relief was in view of the fact that the underlying lawsuit was not brought to require DHSS to pay benefits retroactive to the first day of the month when the application was filed. That policy was in effect prior to the filing of a lawsuit and was not directly affected by it. Rather, the relief sought by the plaintiffs in the original class action was a requirement that DHSS apply this policy uniformly to all applicants for aid under the four categorical aid programs then administered by the state, irrespective of whether an applicant had received General Relief or not.

to base its decision on the alleged state budgetary problems averted to by the defendants in order to demonstrate a change in circumstance sufficient to justify a modification of the injunction.

The district court granted the defendant's motion for relief from judgment and entered an amended judgment on November 5, 1980, that did not include a provision designating the commencement date for the payment of welfare benefits. The plaintiffs thereupon took this appeal from the amended judgment and order of the district court. The plaintiffs also filed motions for a restraining order and for a stay pending appeal, which motions were denied.

Pursuant to Circuit Rule 11, the defendants filed in this Court copies of State of Wisconsin Laws of 1981,

chapter 1, containing the amended Sec. 49.19(4)(b), Wis. Stats., which provides:

> The effective date of eligibility for aid to eligible individuals is the date the applicant submits a signed and completed application to the county department of public welfare or social services, or the first date on which the applicant meets all of the eligibility criteria, whichever is later.

II.

The issue originally presented on appeal was whether the district court properly exercised its discretion in granting the defendant's motion for relief from judgment under Rule 60(b)(5) of the Federal Rules of Civil Procedure.[3/] However, the defendants-

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[3/] Rule 60(b)(5) provides the following grounds for relief from judgment:

> The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is

(footnote continued)

appellees have brought to this Court's attention the recent amendment of Sec. 49.19(4)(b), Wis. Stats. that has the effect of changing the entire posture of this case, at least with respect to the appellants' claim subsequent to April 1, 1981, the effective date of the legislation in question. At the outset we note that it was within the authority of the Wisconsin legislature under the Federal Welfare Regulations to enact the amendment of Section 49.19(4)(b), Wis. Stats. 45 C.F.R. 206.10(a)(6) and that DHSS is bound by state law to administer

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(footnote continued)

> no longer equitable that the judgment should have prospective application.

public assistance in accordance with such duly enacted statutory provisions. Section 46.03(8) Wis. Stat.

Where, as here, the terms of an injunction are brought into conflict with statutory objectives by a subsequent change in law, it has long been settled that judicial deference to the legislative revision of a judicial decree is mandated. System Federation v. Wright, 364 U.S. 642, 81 S.Ct. 368 (1961); Hodges v. Snyder, 261 U.S. 600, 43 S.Ct. 435 (1923); State of Pennsylvania v. Wheeling and Belmont Ridge Company, 59 U.S. (18 How.) 421, 15 Lawyers Edition 435 (1855); Class v. Norton, 507 F.2d 1058 (2d Cir. 1974); McGrath v. Potash, 199 F.2d 166 (D.C. App. 1952); See: Commissioners of Highways of Towns of Annawan v. United States, 466 F. Supp. 745 (N.D. Ill. 1979); 7 Moore's Federal Practice,

¶60.26[4] (1979).[4/] The consent decree

[4/] The policy of judicial deference to legislative revision of statutes upon which a prospective court order is based was first enunciated in Pennsylvania v. Wheeling and Belmont Bridge Company, (supra). There the Supreme Court vacated an earlier decree directing the removal of a bridge as an obstruction to navigation under federal law in view of legislation subsequently enacted by Congress declaring the bridge to be a lawful structure. In so doing, the Supreme Court recognized an exception to the general proposition that an act of Congress cannot abridge the rights of parties established by a court judgment. This exception to the inviolability of court judgments arises where suit is brought to enforce a public right. (Id. at 431.) Public rights are involved when a judicial decree calls for actions which would directly effect the rights of many people not privy to the judgment. Daylo v. Administrator of Veteran's Affairs, 501 F.2d 811, 816 (D.C. Cir. 1974). The Supreme Court in Wheeling and Belmont Bridge also distinguished an action for damages, which is based on a private right, from one for injunctive relief, noting that only the latter is subject to legislative change. (Id.) The principle of judicial deference enunciated in Wheeling Bridge applies equally to injunctions contained in consent decrees. System Federation v. Wright, 364 U.S. at 650, 651. The Supreme Court in the latter case followed Wheeling Bridge to hold that the district court erred in refusing (footnote continued)

in this case stands in much the same posture as did the injunction at issue in Class v. Norton, (supra). In that case the Connecticut Commissioner of Welfare appealed a denial of the state's motion for relief under Rule 60(b)(5) from an order of the district court which, among other things, enjoined the Commissioner to process applications for AFDC within thirty days of an individual's filing of an application. The order at issue in that case was based on an HEW regulation that had established a thirty-day ceiling for processing welfare applications, but which was subsequently amended to extend

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(footnote continued)

to modify a consent decree barring a union shop in light of a subsequent act of Congress making a union shop permissible.

the period to forty-five days. The Second Circuit determined that the principle of deference enunciated in Wheeling and System Federation was decisive of that case, reasoning as follows:

> The principle's application to the instant case is plain. The district court required that the appellant process AFDC applications within 30 days of filing because the HEW regulations so required. Unlike that part of the court's order relating to retroactive payments, see II, infra, this 30-day ceiling relied for its force upon a regulation which has since been amended. In this instance, therefore, the amendment to the regulation directly undercuts the authority for the 1972 order.

At page 1062.

In the instant case, the district court's decree was patterned after a DHSS policy that was authorized by a state statute that was subsequently amended. Consequently, the amended statute effec-

tively undercuts the authority of the 1973 decree to direct the manner of payment of welfare benefits by the defendants. Where there has been a change of law upon which a prior judgment is based, albeit indirectly in the instant case, a ground for relief is established under Fed. R. Civ. P. 60(b)(5), since the statutory basis for the injunction has been removed. Cf.: McGrath v. Potash, 199 F.2d at 167 (applying Fed. R. Civ. P. 60(b)(6); See 7 Moore's Federal Practice, ¶ 60.24[4] at 335. Were the district court to find otherwise would be an abuse of discretion. See e.g., Class v. Norton, (supra); System Federation v. Wright, 364 U.S. at 373.

Accordingly, the order of the district court granting relief from judgment is affirmed on the basis of the legislative revision of the 1973 consent decree

that took effect April 1, 1981. However, as more particularly set forth below, we find that the district court erred in initially granting relief from judgment on the grounds asserted in its opinion. Consequently, our affirmance is partial, extending from the April 1, 1981, effective date of the amended legislation; we reverse the district court's order for the period intervening between the entry of the amended judgment on November 6, 1980, and the April 1, 1981, effective date of the amended legislation.

III.

The district court held that further enforcement of the 1973 judgment worked an injustice warranting relief under Federal Rule of Civil Procedure 60(b)(5) because the terms of the decree curtailed DHSS discretion and granted overbroad relief to the plaintiffs. At the same

time the district court rejected an attempted showing by the defendants of changed circumstances due to the state's budgetary problems arising after the 1973 decree, based upon its interpretation of our opinion in DeFilippis v. United States, 567 F.2d 341 (7th Cir. 1977) as not requiring a showing of changed circumstances under Rule 60(b)(5). In this connection the court opined:

> In addition to the "change in circumstances" test in DeFilippis, I believe that such case permits a broader consideration in resolving the issue of amending the judgment. The party desiring modification may also show that continued enforcement of the injunction 'works an injustice. DeFilippis, p. 344. I am convinced that further enforcement of paragraph 1 of the 1973 judgment will indeed work a significant injustice sufficient to warrant modification of the injunction.'

Our interpretation of DeFilippis does not support the district court's

conclusion that a party desiring modification may also show, in addition to the change in circumstances, that continued enforcement of an injunction works an injustice. DeFilippis involved an appeal by the Marine Corps from a denial of a motion to vacate an earlier permanent injunction prohibiting the Marine Corps from enforcing its "no wig" regulation against members of the Marine Air Reserves. The government sought relief from the prior injunction after the Supreme Court in Kelley v. Johnson, 425 U.S. 238, 96 S.Ct. 1440 (1976) upheld the validity of police department hair grooming standards similar to those of the Marine Corps. We held against the government in DeFilippis for the express reason that, "(the government) had made no showing of how continued enforcement of the injunction works an injustice or

constitutes a 'grievous wrong' . . . . it only cited Kelley v. Johnson, (425 U.S. 238, 96 S.Ct. 1440 (1976)). The Kelley decision, even if applicable, was not itself such a subsequent event as to render inequitable continued application of the injunction." (at 344).

The district court apparently concluded from this quoted language that "The party desiring modification may also show that continued enforcement of the injunction 'works an injustice.' DeFilippis p. 344." Nowhere is there language in that opinion which clearly allows such an alternative showing under the rule. The district court read the "works an injustice" language in the opinion out of context. When read as a whole, it is clear that our opinion in DeFilippis applies the well settled principle of United States v. Swift, 286 U.S.

106, 52 S.Ct. 460 (1922). That treatise adopts the Swift standard and is expressly relied upon and summarized in DeFilippis in pertinent part as follows: "This provision Rule (60(b)(5)) does not allow relitigation of issues that have been resolved by judgment. Rather, it requires a change in the conditions that make continued enforcement inequitable." (DeFilippis 343-44 and 11 Wright & Miller, Federal Practice, § 2863 (1973), that relief from a consent decree may be accorded only when it would be inequitable to enforce the decree due to a change in conditions.)[5/] The alternative

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[5/] In addition to this Court's express reliance in DeFilippis on the Swift standard noted above, there are other indications on page 344 of that opinion of our adherence to the "changed circumstances" requirement. For example, the phrase "grievous wrong," as internally quoted in the sentence quoted above from our holding in DeFilippis, appears in a line from Swift that we quoted and under-
(footnote continued)

showing suggested by the district court would be a major departure from the rule of decision established by Swift and consistently followed by this and other courts in interpreting the "no longer equitable" phrase contained in Rule 60(b)(5) as referring to a change in

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(footnote continued)

scored in DeFilippis as follows: "Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation." (Id.) Thus as the phrase "grievous wrong" is used in this Court's opinion in DeFilippis, it is obviously used in reference to the Swift quotation immediately preceeding, wherein grievous wrong is of the sort evoked by new and unforeseen conditions. Moreover, this Court continued its discussion by noting that the Kelley decision, relied upon by the government in that case, "was not by itself such a subsequent event as to render inequitable continued application of the injunction." (Id.)(emphasis added).

conditions. See generally, 7 Moore's Federal Practice (supra) at 333, 334. If the suggested alternative "works an injustice" standard were intended by this Court a more explicit indication and explication of our departure from prior holdings would have been forthcoming.

It is significant that the two reported cases which cite DeFilippis, Baird v. Lynch, 82 F.R.D. 16, 18 (E.D. Wis. 1979) and Schmidt v. Schubert, 79 F.R.D. 128, 129 (E.D. Wis. 1978), both quote from that opinion the following: "Rule 60(b) provides for extraordinary relief. Because of the interest in finality of judgments, Rule 60(b) requires a showing of exceptional circumstances or a grievous wrong evoked by new and unforeseen conditions." (quoting from DeFilippis, p. 342). Implicit in the reliance of the Wisconsin District

Courts in Baird and Schmidt (supra) upon the foregoing proposition from DeFilippis, is that the lower courts have not heretofore interpreted the DeFilippis opinion as allowing the alternative showing suggested by the district court. In conclusion, we hold that the district court erred in thus interpreting DeFilippis and that it was an abuse of discretion to grant the defendants' motion to vacate in the absence of a finding of changed circumstances.

The October 21, 1980, order of the district court granting the defendants' motion to vacate paragraph one of the 1973 judgment is reversed in part and affirmed in part, and the case is remanded for a determination by the district court of the appropriate relief to be accorded to the plaintiffs for the period ensuing after the entry November 5, 1980,

of the amended judgment and prior to the April 1, 1981 amendment of sec. 49.19(4)(b), Wis. Stat. Costs to be borne by the respective parties.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

MILDRED DAUBERT and ETHEL ROYSTER, Individually and on behalf of all other persons similarly situated,

Plaintiffs,

v. No. 73-C-11

DONALD E. PERCY, et al.,

Defendants.

DECISION AND ORDER

The court of appeals for the seventh circuit remanded this case "for a determination by the district court of the appropriate relief to be accorded to the plaintiffs for the period ensuing after the entry November 5, 1980, of the amended judgment and prior to the April 1, 1981 amendment of sec. 49.19(4)(b), Wis. Stat." The parties stipulated to the

procedure for resolving the issue called for in the remand order. Briefs have been submitted by both sides, and the issue is ready for resolution.

The defendants maintain that the eleventh amendment bars the award of any monetary relief for the period in question. The defendants also contend that the defendants' fiscal situation constituted a change in circumstances that justified relief in favor of the defendants under Rule 60(b)(6), Federal Rules of Civil Procedure.

In my opinion, the defendants' reliance upon the eleventh amendment is misplaced. In the case at bar, the original injunction which required the expenditure of state funds was part of a consent decree. Although that original order was improperly modified by this court, it does not follow that the

revival of the original order offends the eleventh amendment.

I also reject the defendants' suggestion that they are entitled to relief under Rule 60(b)(6), Federal Rules of Civil Procedure. I am not impressed with the argument that the change in fiscal circumstances justifies the modification of the 1973 order as sought by the defendants. Ackermann v. United States, 340 U.S. 193, 202 (1950). It follows that the plaintiffs are entitled to the restoration of benefits lost as a result of this court's order amending the 1973 injunction insofar as it was declared erroneous by the court of appeals. All of the affected applicants for the period ensuing after the entry November 5, 1980, of the amended judgment and prior to April 1, 1981, shall have their initial AFDC grants recomputed, and they shall be

entitled to receive the difference between the amount actually received and the amount they would have received had the 1973 injunction not been erroneously modified by this court.

IT IS SO ORDERED

Dated at Milwaukee, Wisconsin, this 28th day of September, 1982.

/s/ Myron L. Gordon
U. S. District Judge

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 82-2787

MILDRED DAUBERT and ETHEL ROYSTER, Individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

v.

DONALD E. PERCY, Individually and as Secretary of the Department of Health and Social Services,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin, No. 73 C 11--
Myron L. Gordon, Judge.

ARGUED APRIL 7, 1983--
DECIDED AUGUST 4, 1983

CUMMINGS, Chief Judge, COFFEE, Circuit Judge, and WEIGEL, Senior District Judge.*

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* The Honorable Stanley A. Weigel, Senior District Judge of the Northern District of California, is sitting by designation.

CUMMINGS, Chief Judge. In 1973, as part of a consent decree a federal district court in Wisconsin issued a permanent injunction against the Secretary of the Wisconsin Department of Health and Social Services ordering him and his successors in office to make certain welfare payments. Seven years later, a successor, a defendant in this suit, moved under Rule 60(b)(5) of the Federal Rules of Civil Procedure for relief from that judgment. In October 1980 the district court granted the motion and improperly amended the 1973 injunction so that the Secretary, on behalf of the state, could refuse to make some of the payments required by the 1973 judgment. Plaintiffs appealed from that decision and while the appeal was pending, the Wisconsin legislature amended the statute that underlay the original 1973 judgment,

making that judgment unsound. In an unpublished opinion this Court reversed, but because of the intervening change in the statute did not reinstate the 1973 injunction. Instead, we remanded the case "for a determination by the district court of the appropriate relief to be accorded to the plaintiffs" for the period between the date the district court's judgment amending the 1973 injunction was entered and the effective date of the change in the Wisconsin statute--a period of about 5 months. On remand, in September 1982 the district court ordered the Secretary on behalf of the state to pay the benefits that the state would have been required to pay during those 5 months had the 1973 injunction not been amended. The Secretary has appealed from that final order on the single ground that it

violates the Eleventh Amendment. The district court had rejected that argument, stating "Although that [1973] original order was improperly modified by this court [in 1980], it does not follow that the revival of the original order offends the eleventh amendment." For the reasons that follow, we affirm.

The Eleventh Amendment was not intended to insulate a state from the risk that a judgment affording its officials relief from a seven-year-old injunction might be reversed on appeal. The showing required for such relief is difficult to make--"Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions" will do, United States v. Swift, 286 U.S. 106, 119, and the possibility that a court of appeals might reverse a district court and find that such showing had not been

made is not so slight that it is unfair to require that states make allowance for it--i.e., by setting aside pending appeal a reserve of funds in an escrow account. Citing Edelman v. Jordan, 415 U.S. 651, and Quern v. Jordan, 440 U.S. 332, defendants argue, however, that the district court's present order is unconstitutional because it is retroactive in that the benefits the state must pay accrued before the district court ordered them paid. But not every award of retroactive monetary relief payable from a state treasury violates the Eleventh Amendment. Had the Secretary chosen to defy the 1973 injunction instead of moving for relief from it, the district court could have held him in contempt and ordered him to pay from the state treasury benefits that had already accrued. Hutto v. Finney, 437 U.S. 678;

see also Vecchionne v. Wohlgemuth, 558 F.2d 150 (3d Cir. 1977), certiorari denied, 434 U.S. 943; Rodriquez v. Swank, 496 F.2d 1110 (7th Cir. 1974), certiorari denied, 419 U.S. 885. True, civil contempt fines are both remedial and punitive, and since the Secretary had been in compliance with the amended injunction when he refused to make the payments at issue on this appeal, the only reason for ordering him to make those payments now is to compensate those injured by the amendment. But it is the effect a judgment has upon a state, not its purpose, that determines whether it violates the Eleventh Amendment. It is the disruptive effect a retroactive money award has upon a state's budget that distinguishes it from an injunction requiring an equal amount of prospective monetary relief. Hutto v. Finney, 437

U.S. 678, 692 n. 18; Edelman v. Jordan, 415 U.S. 651, 666 n. 11. State budget planners can take account of the latter, but not the former. Ordering a state to pay benefits that it had been required to pay for seven prior consecutive years is no more disruptive of its budget process than is asking it to pay a civil contempt fine, especially when, as here, the benefits are limited to those that accrued during a 5-month period.

The funds which defendants oppose paying are not compensation for loss prior to the entry of the 1973 injunction. They are funds which were required to be paid by that prospective injunction but were withheld because the injunction was erroneously modified in October 1980. Absent the erroneous modification and consistently with the Eleventh Amendment, defendants would have provided the

benefits until the April 1, 1981, Wisconsin legislative change. The 1973 injunction was admittedly permissible under the Eleventh Amendment. That Amendment does not bar the September 1982 order at issue because it was only effectuating the prior injunction during the brief period before the Wisconsin legislature acted.

Judgment affirmed.

A true Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Seventh Circuit

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

September 20, 1983

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. STANLEY A. WEIGEL, Senior District Judge*

MILDRED DAUBERT and ETHEL ROYSTER, Etc., Plaintiffs-Appellees,	) Appeal from) the United) States Dist) rict Court) for the East
No. 82-2787 vs. DONALD E. PERCY, Etc., Defendant-Appellant.	) ern District) of Wisconsin.) No. 73 C 11) Myron L. Gordon) Judge.

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by defendant-appellant Donald E. Percy, no judge in active service has requested a vote thereon, and all of the judges on

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* The Honorable Stanley A. Weigel, Senior District Judge of the Northern District of California, is sitting by designation.

the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin

ROBERT W. LARSEN
Assistant Attorney General
of Wisconsin

Attorneys for Petitioner

Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3076

Office - Supreme Court, U.S.
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Case No. 83-1003

In The

Supreme Court

Of The United States

DONALD E. PERCY,

Petitioner,

v.

MILDRED DAUBERT and
ETHEL ROYSTER, Individually
and on behalf of all other
persons similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

MARGARET J. VERGERONT
PATRICIA McMAHON
Attorneys for Respondents

LEGAL ACTION OF WISCONSIN, INC.
31 South Mills Street
Post Office Box 9686
Madison, WI 53715-0686
608/256-3304

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DONALD E. PERCY,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

QUESTION PRESENTED FOR REVIEW

When a prospective injunction, permissible at the time of entry under the Eleventh Amendment, is later erroneously modified and the modification is reversed on appeal, does the Eleventh Amendment bar the restoration of the benefits which would have been provided respondents, consistent with the Eleventh Amendment, had the injunction not been erroneously modified?

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STATEMENT OF THE CASE

Respondents accept the Statement of the Case contained in the petition with the following modifications and additions.

This case has already been before this Court on another petition for certiorari filed by this same petitioner on October 30, 1981 in which petitioner sought review of the decision of the United States Court of Appeals for the Seventh Circuit reversing in part the modification of the 1973 injunction. Petitioner's Appendix 149. The petition for certiorari was denied by this Court on January 11, 1982.

It was subsequent to the denial of that petition that the district court then considered the appropriate relief to be granted respondents in light of the Court of Appeal's decision.

In describing the relief sought by respondents on remand to the district court to determine the appropriate relief, petitioner characterizes the relief as "retroactive monetary relief." To be more precise, respondents were seeking the AFDC benefits which would have been paid from November 5, 1980 to April 1, 1981 under the 1973 injunction had that injunction not been erroneously modified by the district court during that time period. Petitioner appealed from the district court decision granting that relief. Petitioner's Appendix 145. When the Court of Appeals affirmed that decision (Petitioner's Appendix 149), petitioner sought a rehearing and rehearing *en banc*, which was denied by the Court of Appeals on September 20, 1983.

SUMMARY OF ARGUMENT

Respondents contend that the petition for a writ of certiorari should not be granted because the decision of the Court of Appeals for the Seventh Circuit that the Eleventh Amendment does not bar the relief granted is not inconsistent with the decisions of this Court or courts of other circuits and is a correct application of the law to an unusual set of circumstances not likely to arise again.

ARGUMENT

I. THE ELEVENTH AMENDMENT AS INTERPRETED BY THIS COURT AND THE COURTS OF OTHER CIRCUITS DOES NOT BAR AN ORDER WHICH DOES NOTHING MORE THAN EFFECTUATE AN INJUNCTION PREVIOUSLY ISSUED CONSISTENT WITH THE ELEVENTH AMENDMENT.

The judicial history of this case, which gives rise to the issue presented on review, represents a rather unique set of circumstances. A prospective injunction was entered in 1973 which required petitioner to provide AFDC benefits[1] to eligible applicants retroactive to the first date of the month of application. This necessitated the expenditure of substantial funds, and petitioner had been expending these funds for years in compliance with the injunction. Petitioner ceased expending the funds in question on November 5, 1980, because the district court granted petitioner's request to modify the injunction to limit the initial month's benefits. However, the Court of Appeals determined that the modification of the injunction was erroneous for the period from November 5, 1980 to April 1, 1981.[2] Petitioner now claims that the Eleventh Amendment bars an order requiring the expenditure of funds which he would have had to expend, consistent with the Eleventh Amendment, had the 1973 injunction not been erroneously modified.

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[1]The 1973 injunction also concerned other benefit programs, but the other programs are no longer in effect and thus are not relevant to this proceeding.

[2]On April 1, 1981 state legislation passed which, as respondents conceded before the Court of Appeals, did make proper a modification of the injunction.

In its decision, the Court of Appeals considered the relevant leading decisions of this Court on the Eleventh Amendment, specifically, *Edelman v. Jordan*, 415 U.S. 651 (1974), and *Quern v. Jordan*, 440 U.S. 332 (1979). The Court of Appeals concluded that these decisions do not bar the order entered by the district court because that order does nothing more than effectuate the 1973 injunction during the time period it was erroneously modified.

Petitoner argues that *Edelman v. Jordan* and the cases following it bar the district court order because they prohibit the granting of "retroactive monetary relief" against state officials. However, all the cases discussed by petitioner, including *Kimble v. Solomon*, 559 F.2d 599 (4th Cir), *cert. denied*, 440 U.S. 950 (1979), concern the propriety of orders which require state officials to compensate for monetary loss occuring prior to the entry of any prospective injunction. By contrast, in this case the funds which petitioner contends they should not have to pay are *not* compensation for a loss occurring prior to the entry of the prospective injunction on June 1, 1973. Rather, they are funds which were required to be paid by the terms of that injunction but which were not paid for a particular period of time because it was erroneously modified. Therefore, the facts of this case do not come within the prohibition of *Edelman v. Jordan*.

The continual characterization by petitioner of the relief ordered by the district court as "retroactive" does not answer the obvious question, which is: retroactive in relation to what? According to petitioner's view, the prospective/retroactive distinction can shift continually throughout litigation, so that the very relief obtainable under an order which was prospective, and therefore permissible, when entered, can become retroactive, and therefore barred, at a later point in litigation. Neither *Edelman*

v. Jordan nor subsequent cases cited by petitioner suggest such a reading of the Eleventh Amendment.

Indeed, this Court has recognized that the "line between retroactive and prospective relief cannot be so rigid that it defeats effective enforcement of prospective relief." *Hutto v. Finney*, 437 U.S. 678, 690 (1977). In that case, this Court upheld an award of attorney's fees against a state which had not complied with a prospective injunction. In addition to referring to *Hutto v. Finney*, the Court of Appeals considered circuit court cases in which states have been ordered to expend funds to comply with previously entered prospecitve injunctions. *Vecchione v. Wholgemuth*, 558 F.2d 150 (3d Cir. 1977), *cert. denied* 434 U.S. 943 (1977); *Rodriguez v. Swank*, 496 F.2d 1110 (7th Cir. 1974), *cert. denied*, 419 U.S. 885. While the Court of Appeals recognizes that these cases differ from the instant case in that petitioner was acting pursuant to the district court's order modifying the 1973 injunction in his withholding of the funds, it correctly recognizes that the reasoning of the cases just cited do not rest primarily on the culpable nature of the state's conduct. Rather, it rests on a recognition that when an injunction is entered which is permissible at the time of entry under the Eleventh Amendment, the Eleventh Amendment does not bar a later order which does nothing more than effectuate the previously entered injunction.

II. THE COURT OF APPEALS IS CORRECT IN ITS RULING ON THE DISTRICT COURT'S AUTHORITY TO GRANT RELIEF ON REMAND.

All of petitioner's arguments follow from his initial and erroneous assumption: that for purposes of the Eleventh Amendment, relief after reversal of ar

order modifying an injunction is to be treated the same as relief granted in an initial injunction. Thus, petitioner wishes this Court to analyze its behavior in withholding funds pursuant to the district court's order of October 21, 1980, granting modification as though no injunction ordering the expenditure of funds had previously existed and as though the order granting modification were not later reversed.

Petitioner begins by presenting arguments justifying the modification. Specifically, petitioner argues that because the district court in its October 21, 1980 order found that the 1973 injunction was broader than that required by statutory or constitutional law, he was not violating statutory or constitutional law in withholding the funds pursuant to the district court's order modifying the injunction. Therefore, he concludes, the Eleventh Amendment prohibits an order restoring those funds after reversal of the modification. The argument that the 1973 injunction was overly broad is precisely the argument which was presented to the district court on petitioner's motion for modification, and the district court accepted it as a basis for modification of the injunction. However, the Court of Appeals reversed that decision, concluding that the 1973 injunction was improperly modified prior to April 1, 1981, because the petitioner had not shown changed and unforeseen circumstances as required by Fed R. Civ. P. 60 (b)(5). This can only mean that the original 1973 injunction was lawful prior to April 1, 1981. Since this Court decided not to review the decision of the Court of Appeals but left it standing, the decision of the Court of Appeals is the final decision on the validity of the 1973 injunction prior to April 1, 1981. It would therefore be inappropriate to permit petitioner to raise again and in this context his objections to the 1973 injunction.

Petitioner is really arguing, it appears, that the 1973 injunction is not entitled to be enforced and effectuated to the same degree as another injunction might be because it was not based on a violation of statutory or constitutional law. The flaw in this postion can be demonstrated by assuming that the injunction had not been improperly modified but had continued in effect until April 1, 1981. Petitioner would obviously have been in contempt of the 1973 injunction had he disregarded it, and this Court has made clear that monetary awards to compensate for noncompliance with lawful federal court injunctions are not barred by the Eleventh Amendment. *Hutto v. Finney, supra,* 437 U.S. at 691. However, in petitioner's view, he could never be found in contempt of the 1973 injunction because he would only be violating a lawful injunction, not a statutory or constitutional law. Such a position has no support in case law, has the effect of negating the decision of the Court of Appeals reversing modification, and is clearly untenable.

In a similar vein, petitioner argues that because he was acting pursuant to the district court's order permitting modification in withholding funds, his actions were not unlawful, and, therefore, an order restoring those funds is barred by the Eleventh Amendment. Respondents do not, of course, contend that petitioner committed a wrong in altering his policy once the district court permitted modification of the 1973 injunction. Until the decision was reversed, petitioner was justified in acting consistent with it. 5 Am.Jur.2d §997. However, all actions taken pursuant to the decision are dependent for their validity on the decision being sustained. 5Am.Jur.2d §§997, 955. The effect of reversal is to leave the case standing as if the decision reversed had never been rendered. 5B C.J.S. Appeal and Error §1950. Further, the general rule of law is that the party who lost

benefits as a result of a judgment reversed on appeal is entitled to be restored by the other party to the position he would have been in had the erroneous judgment not been entered. *Arkadelphia Co. v. St. Louis S.W. Ry. Co.*, 249 U.S. 134 (1919). 5 Am.Jur.2d §997.

Petitioner cites no cases which support his position that the Eleventh Amendment is in any way intended to limit the customary authority of a court to remedy the effect of an order reversed on appeal. As already stated, the cases petitioner relies on simply do not address this situation because they are concerned with the appropriate limits of the original injunction.

III. THE COURT OF APPEALS' CONSIDERATION OF PETITIONER'S OPPORTUNITY TO SET ASIDE FUNDS IS CONSISTENT WITH DECISIONS OF THIS COURT.

Petitioner argued before the Court of Appeals that failure to reverse the district court's order would create budgetary problems because petitioner had spent the funds withheld pending appeal on other items.

In its decision the Court of Appeals considered significant the fact that petitioner had been expending the funds in question under the 1973 injunction prior to the modification of that injunction, and, since an appeal was taken from that modification, he had the option of setting aside the funds he was withholding until the appeal was decided. Petitioner now argues that consideration of these factors is not permitted by the Eleventh Amendment. However, respondents contend that these factors were correctly taken into account by the Court of Appeals in a

manner consistent with this Court's decision in *Edelman v. Jordan, supra,* and *Hutto v. Finney, supra.*

In *Edelman v. Jordan,* this Court held that a monetary award of welfare benefits to compensate for a time period prior to the entry of the prospective injunction ordering payment of those benefits in the future was barred by the Eleventh Amendment. In so holding, this Court noted that while most prospective injunctions in welfare cases may well have a financial impact on state treasuries, there is a crucial distinction between requiring payment of funds pursuant to a prospective injunction, and requiring payment for a time period previous to the entry of the injunction:

> "...[W]here the state has a definable allocation to be used in payment of public and benefits, and pursues a certain course of action such as processing of applications within certain time periods as did Illinois here, the subsequent ordering by a federal court of retroactive payments to correct delays in such processing will invariable mean there is less money available for payments for the continuing obligations of the public aid systems." 415 US at 666 n. 11.

Thus, it is the fact that a monetary award for an earlier period cannot be allocated in the state's planning process without disruption to other programs which distinguishes it from money expended pursuant to a prospective injunction.

In *Hutto v. Finney, supra,* this Court refers to the passage from *Edelman v. Jordan* just cited, again emphasizing that the critical factor is the state's opportunity to adjust its budget. In upholding an

award of attorney's fees against a state which had disregarded a prospective injunction, this Court notes:

> "The Attorney General has not argued that this award was so large or so unexpected that it interfered with the state's budgeting process. Although the Eleventh Amendment does not prohibit attorney's fees awards for bad faith, it may counsel moderation in determining the size of the award or giving the state time to adjust its budget before paying the full amount of the fee. Cf *Edelman v. Jordan*, 415 U.S. 651, 666 n.11. In this case, however, the timing of the award has not been put in issue; nor has the state claimed that the award was larger than necessary to enforce the court's prior orders." 437 U.S. at 692, n. 18.

Unlike the fact situation in *Edelman v. Jordan, supra*, petitioner clearly had the option of avoiding disruption to the state budgetary process by reserving the funds in question until the appeal was decided. Petitioner argues that he did not do this because he wanted to spend this money on other items, which was his purpose for attempting to modify the injunction, and this purpose would have been frustrated if he had set aside the funds pending appeal. This is clearly an acknowledgment he had a choice as to how this money should be treated pending appeal. If there is any disruption to the state's budgetary process as a result of the district court's order on remand, it is not an unanticipated and avoidable one, but one brought about by petitioner's decision to allocate the funds in question for other purposes pending appeal.

Oddly enough, petitioner points out in support of his position that had the Court of Appeals granted

respondents' motion for a stay of the modification pending appeal, he would have had to continue to pay out the funds which he now contends he should not have to pay. Petitioner asserts he relied on the denial of the stay in diverting the funds to other programs. However, while denial of the stay made it legal for petitioner to withhold the funds pending appeal, it in no way, explicitly or implicitly, protected him from ever having to restore the funds withheld if the appeal was successful.

It is apparent from petitioner's argument that what he objects to is not the lack of opportunity to plan for the expenditure of funds in question, so that it can be accomplished without disruption to the state budgetary process, but rather to expending those funds at all to effectuate the 1973 injunction. However, as the Court of Appeals notes, the Eleventh Amendment is not intended to insulate a state from the possibility that a modification of a long-standing injunction will not be reversed on appeal.

Petitioner has not shown that the Court of Appeals' interpretation of the Eleventh Amendment is inconsistent with the decisions of this Court or courts of other circuits. While petitioner claims that the lower federal courts have "blatantly acted beyond their constitutional authority," they have done no more, in fact, than effectuate an injunction granted in 1973 consistent with the Eleventh Amendment by requiring the expenditure of funds for a five-month period during which the injunction was erroneously modified. Petitioner has, moreover, achieved the result he sought, that is, limiting the expenditure of such funds in the future, through a state legislative change effective April 1, 1981. Finally, given that the issue which petitioner wishes this Court to review arises from the rather unique history of this case, it is unlikely it will need to be addressed again.

For these reasons, respondents respecfully submit that this Court should deny the petition for writ of certiorari.

Dated at Madison, Wisconsin this 13th day of January, 1984.

MARGARET VERGERONT
PATRICIA McMAHON
Attorneys for Respondents